

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

SAMUEL J. FRABIZZIO,

Plaintiff,

v.

NOLA DOUBET HENDRY and
FRANK HENDRY t/a
CARL DOUBET JR. JEWELERS, and
A. CARL DOUBET, JR., CO.,
a Delaware Corporation

Defendants and
Third-Party Plaintiffs

v.

AAS APPRAISAL LAB, LTD,

Third-Party Defendant.

C.A. No. CPU4-15-000968

Submitted: September 18, 2015

Decided: November 16, 2015

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**ORDER ON THIRD-PARTY DEFENDANT
AAS APPRAISAL LAB, LTD.'S MOTION TO DISMISS**

Third-Party Defendant AAS Appraisal Lab, Ltd. ("AAS") brings this Motion to Dismiss the Third-Party Complaint filed by Defendant-Third Party Plaintiffs Nola Doubet Hendry and Frank Hendry t/a Carl Doubet Jr. Jewelers and A. Carl Doubet, Jr. Co. (collectively, the "Doubets") pursuant to *Court of Common Pleas Civil Rule 12(b)(6)*. The Court held a hearing on the Motion on September 18, 2015, and reserved its decision. This is the Court's decision on the Motion.

FACTS

These proceedings involve the value of certain retail jewelry sold by the Doubets to Samuel J. Frabizzio ("Frabizzio"). Frabizzio filed a Complaint against the Doubets alleging that they are liable for breach of contract/misrepresentation, breach of contract/UCC warranties, deceptive trade practices, and abuse of process. Frabizzio claims that on October 10, 1999 (the "October 10th Sale" or "Sale"), he bought a ring from the Doubets. He further maintains that, at the time of the transaction and leading up to the October 10th Sale, the Doubets made representations about the authenticity and value of the ring, specifically, that the pink sapphire stone (the "stone" or the "ring") mounted on the ring was a natural gem grown in the earth. At the time of the October 10th Sale, the Doubets valued the stone and the mounting at \$12,000.00. After purchasing the stone, Frabizzio maintained jewelry insurance through various insurance companies based on the stone's retail replacement value. Periodically, the coverage amount increased based on the belief that the value of the ring increased over time. In December of 2014, however, Frabizzio learned that the stone was a synthetic gem grown in a laboratory, and brought this action against the

Doubets, claiming that the Doubets misrepresented the ring's value and authenticity prior to the October 10th Sale, and breached the parties' agreement at the time of the Sale. Frabizzio seeks damages in the amount of \$40,000.00, representing, *inter alia*, the current marketplace value of a true pink sapphire stone, and the amount of the insurance premium cost paid by Frabizzio over the past fifteen years.

In their Answer, the Doubets deny that they negligently or knowingly made any incorrect statements or representations to Frabizzio, and raise a number of affirmative defenses.

The Doubets then filed a Third-Party Complaint against AAS.¹ In the Third-Party Complaint, the Doubets maintain that AAS is liable to Frabizzio for breach of contract/misrepresentation, and seek to recover from AAS for indemnification. The Doubets also seek contribution, alleging that AAS negligently or recklessly misrepresented the authenticity of the gem.

In response to the Third-Party Complaint, AAS filed the present Motion to Dismiss, arguing that the Doubets cannot seek indemnification or contribution from AAS because the Third-Party Complaint is predicated upon events that occurred prior to AAS' first appraisal of the ring. AAS contends that it first appraised the ring on October 12, 1999 ("October 12th" or the "October 12th Appraisal"), and as such, cannot be held liable for any damages to Frabizzio that are based on claims pertaining to the October 10th Sale.

¹ The Doubets also brought claims against Aurora Costello a/k/a Aurora A. Stuski-Riley, the owner of AAS. However, Ms. Costello, in her individual capacity, has been dismissed from this action.

STANDARD OF REVIEW

AAS filed the present Motion to Dismiss the Third-Party Complaint pursuant to *Court of Common Pleas Civil Rule* 12(b)(6) for failure to state a claim upon which relief can be granted. On a motion to dismiss, the Court “must determine whether it appears with reasonable certainty that, under any set of facts which could be proven to support the claim, the plaintiffs would be entitled to relief.”² In applying this standard, the Court will assume that all well-pleaded facts in the complaint are true,³ and draw every reasonable factual inference in favor of the non-moving party.⁴

In general, when a motion to dismiss relies on matters outside of the Complaint, the motion is converted into a motion for summary judgment.⁵ There are only two exceptions where extrinsic material will be considered on a motion to dismiss: “(i) where an extrinsic document is integral to a plaintiff’s claim and is incorporated into the complaint by reference, and (ii) where the document is not being relied upon to prove the truth of its contents.”⁶ Generally, however, matters outside of the pleadings should not be considered on a motion to dismiss.⁷

² *Steila v. Steila*, 2009 WL 2581887, at *1 (Del. Com. Pl. Aug. 20, 2009)(quoting *Mortgage Electronic Registration Systems, Inc. v. Haase and Flanagan*, 2006 WL 1454807, at *1 (Del. Super. 2006)(citing *Vanderbilt Income & Growth Assoc. LLC v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996)).

³ *Kuehn v. Cotter*, 2012 WL 2951858, at *3 (Del. Com. Pl. July 20, 2012) (citing *Battista v. Chrysler Corp.*, 454 A.2d 286, 287 (Del. Super. 1982)).

⁴ *Dept. of Labor ex rel. Chasanov v. Brady*, 2010 WL 8706963, at *2 (Del. Com. Pl. Mar. 23, 2010)(citations omitted).

⁵ *Furman v. Delaware Dept. of Transp.*, 30 A.3d 771, 774 (Del. 2011).

⁶ *Id.*

⁷ *Vanderbilt Income and Growth Assoc., LLC v. Arvida/JMB Managers, Inc.*, 619 A.2d 609, 612 (Del. 1996).

Although AAS filed the present Motion as a motion to dismiss, the Doubets attached additional documents outside of the pleadings to their response to the Motion. Specifically, the Doubets attached a one-page screen shot purporting to show certain appraisals that AAS performed in August 1999, as well as an Affidavit of Frank Hendry as President of A. Carl Doubet, Jr., Co. The Doubets contend that these attachments convert the Motion into a motion for summary judgment. On the other hand, AAS contends that these attachments are central to the Doubets' claims against AAS in their Third-Party Complaint, and are being used to bolster those claims. I find that the attached documents are integral to the Doubets' claims and are incorporated into the Third-Party Complaint by reference. The Affidavit of Frank Hendry and one-page screen shot both shed light on the professional relationship between the Doubets and AAS, which is referenced in the Third-Party Complaint in ¶ 4, and on the circumstances surrounding AAS' appraisal of the pink sapphire stone at issue. In fact, a large portion of the Affidavit of Frank Hendry contains the same factual background as provided in the Third-Party Complaint, albeit the Affidavit states that factual background with more specificity than the Third-Party Complaint.⁸ Therefore, I will apply the motion to dismiss standard pursuant to *Rule* 12(b)(6).

DISCUSSION

In this matter, AAS contends that the Third-Party Complaint fails to state a claim upon which relief can be granted because Frabizzio's underlying causes of action against the Doubets are based upon events that occurred *prior to* AAS' first appraisal of the ring. On the

⁸ In a similar vein, the exhibits attached to the Affidavit of Frank Hendry provide more background information as to the qualification of AAS' appraiser, Aurora Stuski-Ryley (now known as Aurora Costello), and other information as to certain appraisals that AAS completed for the Doubets.

other hand, the Doubets argue that they have plead facts sufficient to defeat AAS' motion with respect to its claims for breach of contract and misrepresentation. The Doubets further contend that, due to the parties' course of dealing, any breach of duty owed by AAS to the Doubets for which the Doubets may incur liability would entitle the Doubets to indemnification.

As discussed *supra*, the Third-Party Complaint contains two counts: in Count I, the Doubets seek to recover from AAS for indemnification, claiming that AAS is liable for breach of contract and misrepresentation; in Count II, the Doubets seek contribution, alleging that AAS negligently or recklessly misrepresented the authenticity of the gem.⁹

A. Indemnification

The concept of indemnity is based on the principle that “everyone is responsible for his or her own wrongdoing, and if another person has been compelled to pay a judgment which ought to have been paid by the wrongdoer, then the loss should be shifted to the party whose negligence or tortuous act caused the loss.”¹⁰ There are three situations in which indemnification may exist: “(1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, i.e. indemnification implied in law.”¹¹ Although the majority of jurisdictions do not recognize an implied right to

⁹ The Court notes that Delaware is a “notice pleading jurisdiction,” meaning that the Doubets’ Third-Party Complaint need only give general notice as to the nature of the claim asserted against AAS in order to survive a motion to dismiss. *Nye v. Univ. of Delaware*, 2003 WL 22176412, at *3 (Del. Super. Sept. 17, 2003).

¹⁰ *Lagrone v. American Mortell Corp.*, 2008 WL 4152677, at *4 (Del. Super. Sept. 4, 2008) (citing 41 Am. Jur.2d “Indemnity” § 1 (2008)).

¹¹ *Pandora Jewelry, Inc. v. Stephen's Jewelers, LLC*, 2012 WL 2371043, at *7 (Del. Com. Pl. June 22, 2012) (quoting *Lagrone*, 2008 WL 4152677, at *4).

indemnification, Delaware courts have adopted the minority view that “an obligation to indemnify may be implied from the circumstances of the case.”¹²

In analyzing the Third-Party Complaint, I find that the Doubets have pleaded facts sufficient to put AAS on notice of their indemnification claim. Although the Doubets have not presented the Court with an express contract, they have presented the Court with facts and evidence sufficient to demonstrate that they may have a right to indemnification through a contract implied-in-fact. “An implied contract is one inferred from the conduct of the parties, though not expressed in words.”¹³ ““The parties’ intent and mutual assent to an implied-in-fact contract is proved through conduct rather than words.”¹⁴ In the Third-Party Complaint, the Doubets have asserted that they have had an on-going professional relationship with AAS, and thus, have relied on the representations made by AAS with respect to their appraisals. In considering this, it is clear that AAS had a duty to accurately evaluate and authenticate the ring at issue. Although AAS may have appraised the ring after the October 10th Sale, the Doubets could still seek indemnity from AAS for breaching that duty, should the Doubets be liable to Frabizzio for damages pertaining to the insurance premiums paid on the ring.¹⁵ Therefore, considering the particular circumstances of this

¹² *Id.* at *7 (quoting *Davis v. R.C. Peoples, Inc.*, 2003 WL 21733013, at *3 (Del. Super. July 25, 2013)).

¹³ *Capital Mgmt. Co. v. Brown*, 813 A.2d 1094, 1098 (Del. 2002) (internal quotations omitted).

¹⁴ *Id.* (quoting *Chase Manhattan Bank v. Iridium Africa Corp.*, 239 F.Supp.2d 402 (D. Del. 2002)).

¹⁵ The Court notes, however, that there is a question of fact as to who appraised the ring prior to the October 10th Sale. While AAS denies that it appraised the ring prior to October 12th, the Doubets have not explicitly stated that October 12th was the first time that AAS appraised the ring. In ¶ 5 of the Third-Party Complaint, the Doubets state, “AAA . . . [has] provided appraisal reports on the ring, setting and stone . . . *including but not limited to* October 12, 1999, January 29, 2009, and September 17, 2014.” (Emphasis added). Moreover, in ¶ 5 of the Affidavit of Frank Hendry, Mr. Hendry states “I am aware that AAS appraised and valued the pink

case, I find that the Doubets have pleaded facts sufficient to put AAS on notice of their indemnification claim.

Accordingly, AAS' Motion to Dismiss the Third-Party Complaint pursuant to *Rule 12(b)(6)* is **DENIED** as to the claim for indemnification.

B. Contribution

A joint tortfeasor may be entitled to contribution when it shares a common liability with another tortfeasor, and it is "appropriate for liability to be apportioned among [those joint tortfeasors]."¹⁶ Delaware courts have found that a common liability exists when the complaint contains facts that allegedly support "some theory of negligence" against the defendant.¹⁷

In analyzing the Third-Party Complaint, I find that the Doubets have pleaded facts sufficient to put AAS on notice of their contribution claim. The Doubets claim that AAS negligently and/or recklessly misrepresented the natural make-up and value of the stone. There is no dispute that the stone is a synthetic gem grown in a laboratory, and not a natural stone grown from the earth. Specifically, the Doubets claim that the appraisals prepared by AAS identify the stone as a "modified cushion cut hot pink sapphire," and fail to identify the stone as a synthetic gem. Moreover, the Doubets contend that the Retail Replacement Value for the ring and stone increased on each appraisal completed by AAS, which in turn, provided a basis for Frabizzio's insurance premiums. Therefore, should the Doubets be

sapphire stone after Samuel J. Frabizzio purchased it in October of 1999," however, Mr. Hendry does not state who appraised the ring *prior to* the October 10th Sale.

¹⁶ *Builders & Managers, Inc. v. Dryvit Sys., Inc.*, 2004 WL 304357, at *2 (Del. Super. Feb. 13, 2004) (citations omitted).

¹⁷ *Id.* (citations omitted).


liable to Frabizzio for damages pertaining to the insurance premiums paid on the ring, it would be appropriate for that liability to be apportioned among the Doubets and AAS since the insurance premiums were based off of AAS' appraisals. Therefore, I find that the Doubets have pleaded facts to support at least some theory of negligence against AAS.

Accordingly, AAS' Motion to Dismiss the Third-Party Complaint pursuant to *Rule 12(b)(6)* is **DENIED** as to the claim for contribution.

CONCLUSION

For the reasons stated *supra*, AAS' Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to *Court of Common Pleas 12(b)(6)*, the motion is **DENIED**.

IT IS SO ORDERED this 16th day of November, 2015.



The Honorable Alex J. Smalls
Chief Judge